[redacted]

[redacted]

Byron N. Scott, Respondent

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENT IN OPPOSITION

Byron N. Scott, *Pro se*
626 A Street S.E.
Washington, D.C. 20003

Press of Byron S. Adams Printing, Inc., Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, *Petitioner*

v.

BYRON N. SCOTT, *Respondent*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Byron N. Scott, appearing *pro se* and at the request of the Court, opposes the issuance of the petition for Writ.

QUESTION PRESENTED

The Petition purports to pose two questions for this Court but, since the Trial Court, sitting without a jury, did not exclude the alleged "magnetic tape recordings" for the reason ascribed by petitioner (See Petition, page 4) and since the Trial Court ruled that there was no question of credibility as far as the controlling issue in this case, breach of contract, was concerned, the real question is whether there was anything in the pleadings, the pre-trial order or the trial itself to justify certiorari by this Court to force the

Trial Court to listen to the "tapes" or read respondent's answer to a grievance which was dismissed for lack of merit. The answer must, of course, be "no" as will readily appear when the material facts are stated correctly.

STATEMENT OF THE CASE

Petitioner (hereinafter Frommhagen) sued respondent (hereinafter Scott) alleging breach of a contract "to represent him before the Supreme Court" and demanding return of the "retainer" he had paid, plus costs. Scott denied liability on the grounds of performance, prior breach with resultant impossibility of complete performance and also counter-claimed for services rendered and for damages for libel. The Trial Court found that from October of 1967 to September 1971, Scott had performed legal services for Frommhagen for the $250.00 he had received; that the "retainer" memorandum the parties signed did not purport to be the entire understanding of the parties; that there had been "no meeting of the minds on the agreement asserted by the plaintiff"; and that Scott had been justified in refusing to sign the Petition or pay for its printing when Frommhagen had refused to make the deposit for the filing fee and the printing costs and had insisted on having the Petition printed in California. The Trial Court also held that Frommhagen had failed to prove by a preponderance of the evidence that Scott had been guilty of negligence in his dealings with Frommhagen. The Court disposed of Scott's counter-claims on the same grounds. At pre-trial, the parties stipulated to certain material and controlling facts which were read into the record at the trial. References in the text are to the pre-trial stipulations by number.

Frommhagen, in late 1967, had asked Scott for legal advice on problems which he then had and expected to have in connection with his Federal employment with NASA (1,2). A year went by and, in the fall of 1968, Frommhagen, who by that time had been fired by NASA, asked Scott if he would prepare and file a petition for certiorari in this Court when the U.S. Court of Appeals for the 9th Circuit affirmed an adverse summary judgment the U.S. District Court for the Northern District of California had entered on September 9, 1968 in a libel suit Frommhagen had filed with it against one of his superiors. Frommhagen, represented by California counsel, had appealed this judgment. Scott said that he would do so for a fee (4,5,6,7). Scott heard nothing further from Frommhagen until February of 1969, on the 6th day of which, the parties, during a conference, signed a "retainer agreement for $250.00 for 10 hours of legal services with a provision for a refresher". Frommhagen also "promised to pay all costs specified by Scott connected with the filing of the petition, if it were filed" (8,9). Frommhagen finally paid the $250.00 on June 13, 1969 and coupled it with a request that Scott prepare a rough draft of a "Brief for Appellant" for the Court of Appeals (10,11,12).

From June of 1969 to September of 1971, Scott performed various legal services for Frommhagen, including but not limited to telephone consultations on some of Frommhagen's many problems, legal research, letter writing, legal opinions and advice, preparation of a "list of points" to be included in the Court of Appeals brief, and the drafting of a petition for presentation to this Court (13,16,17,21,22,23,24,25,27). The 9th Circuit affirmed on April 27, and denied a Petition

for Rehearing on June 8, 1971. On June 18, 1971, Frommhagen, by telephone, renewed his request for Scott to prepare and file a Petition for a Writ of Certiorari. Scott agreed to perform; asked for a deposit of $100.00 for the filing fee; a deposit of $350.00 as an advance against estimated printing costs; and told Frommhagen that he would not do anything about printing the petition until he had both sums in hand (18,19,20,21). At the trial, Scott testified that during this telephone conversation he told Frommhagen that he had ninety days from the date the Court of Appeals denied the Petition for Rehearing to file the petition in this Court. Frommhagen insists that Scott said ninety days from the entry of the mandate of the Court of Appeals. Scott heard nothing further from Frommhagen until August 9, 1971, at which time he received a file, not the record, on the libel case from Frommhagen. In the letter attached to it, Frommhagen directed Scott to prepare and file the petition and promised to be in Washington, D.C. at some time between August 24 and 27. On August 12, Scott advised Frommhagen by letter that a petition for a writ would be denied and advised him to save the money it would cost to print the petition and file it. On August 17, Frommhagen called Scott over the phone; told him to prepare the petition and again talked about the filing fee and printing costs (21,22,23,24). At the trial, Scott testified that in this conversation he told Frommhagen that he would not put up the filing fee for him and that he must come up with the money for the printing costs. Scott also testified that in the conversation F ommhagen promised to bring the required money with him when he came to Washington later that month. Scott prepared a draft of a petition for certiorari (26,27,28,29). Frommhagen did not show

up in Washington at the appointed time and on August 31, Scott received a telegram from him saying that he would not be in Washington until September 10, 1971 (25). At the trial, Scott testified that he waited for Frommhagen to call which he did on September 1. Scott also testified that Frommhagen, during this telephone conversation objected to the size of the estimated printing bill; said he could get it done cheaper in California; and asked Scott to send the draft to him there. Scott also testified that he told Frommhagen that he (Frommhagen) could not get it printed in California and back to Washington in time to file it but Frommhagen said that he had "made arrangements" so that he could get it printed and fly to Washington with it in time to file it on the due date. On September 2, Frommhagen and his California attorney called Scott and asked him to send the draft to Frommhagen in California (26). Scott testified he told Frommhagen's lawyer that he could have the petition printed in Washington and file it on time if Frommhagen would send the money. Scott also testified that he told Frommhagen's lawyer that if he (Scott) had to send the draft to California for printing, it would be "up to Mr. Frommhagen." When Frommhagen and his lawyer insisted, Scott sent the draft to California by air mail, special delivery on September 3 (26, 27). The draft provided for signature by Frommhagen, *pro se* (30). The only money Frommhagen ever paid to Scott was the $250.00 paid on June 13, 1969. He never did make a deposit for the filing fee or the printing costs (31). Frommhagen later asked for additional time in which to file a petition which request was granted by Mr. Justice Douglas and a petition was filed by a California lawyer. It was denied.

At the trial, Frommhagen sought to introduce an answer Scott had made to one of the Frommhagen grievances "as in the nature of impeachment testimony." The Trial Court excluded the "answer" saying it was not "proximate enough to what I have to decide to make it substantially important on the question of credibility." In his brief to the Appeals Court below, Frommhagen said that he had attempted to introduce the answer "for the purpose of impeaching Scott's testimony that he had always known that the date of June 8, 1971 tolled the beginning of the ninety day period for filing the petition for writ of certiorari (hence September 6 was the last day for said filing), that he had researched that point several times, and that Frommhagen had coerced him into putting the date of September 13, 1972 in his rough draft of the petition" (page 5). But—Scott had made no such testimony and had not put the date of September 13, 1972 in his draft of the petition. In his Petition, Frommhagen says that he sought to introduce the answer to impeach testimony by Scott that "he had known that the ninety day period for filing the petition for writ of certiorari tolled from the day of entry of the Court's denial of the petition for rehearing". He says that Scott's answer to the grievance had "admitted that he had believed erroneously that said period tolled from the day the Appeals Court issued its mandate." Scott had made no such admission.

In his petition, Frommhagen says he had sought to introduce the "magnetic tape recordings to prove Scott had not made demands of Frommhagen in telephone conversations in August of 1971 for additional legal fees and court expenses and printing costs". In his Brief to the Court of Appeals, he said that he had sought to introduce the tapes to impeach Scott's testi-

mony that Frommhagen had insisted that Scott relinquish control of the editing and printing of the petition. Scott did not testify that Frommhagen had insisted that Scott "relinquish control of the editing and printing of the petition". Frommhagen obviously forgot that it had been stipulated at pre-trial that he had discussed the filing fee and printing costs with Scott during the August 17, 1971 telephone conversation and that it had also been stipulated that Frommhagen insisted that Scott send the draft to California to let Frommhagen have it printed.

REASONS FOR REFUSING THE WRIT

1. Frommhagen agreed at pre-trial that on February 6, 1969, he had promised to pay all costs specified by Scott connected with the filing of the petition (9). He agreed at pre-trial that on June 18, 1971, Scott had said that he wanted the money for the filing fee and printing costs in advance of preparation of the petition (21). He agreed at pre-trial that he and Scott had discussed the filing fee and the printing costs in a telephone conversation on August 17, 1971 (24). He agreed at pre-trial that he had not given Scott the money for the filing fee and the printing costs (31). The Trial Court ruled correctly when he excluded these attempts to attack these stipulated to facts.

2. Frommhagen doesn't seem to be quite sure what he was trying to accomplish by offering the "answer" or the "tapes" but neither would have disproved the fact that he had agreed to pay all "costs" and then refused to do so.

3. The question of whether Frommhagen violated laws or regulations by recording telephone conversa-

tions without notifying the other party to the conversation would better be left to a case where it is the issue. It is not the issue here.

4. Of course prior inconsistent statements are admissible against a party and for impeachment purposes but not to disprove a fact to which the offeror has agreed at pre-trial.

5. Reception or exclusion of the "answer" and/or the "tapes" for the purposes for which Frommhagen has thought at different times he was offering them, whatever that might be, lay within the sound discretion of the Court and this discretion was not abused by the rejection of both.

6. Frommhagen had laid no proper foundation for reception of the "answer" and/or the "tapes".

7. President Nixon's difficulties with tapes presents no parallel for Frommhagen and his "tapes". No similar question is involved.

8. The judgment of the Trial Court was supported by the evidence and was not plainly erroneous. It should not, therefore, be disturbed.

For the foregoing reasons and because of the facts and circumstances in this case, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied and the petitioner left to other devices for venting his spleen against attorneys and the courts in researching for his said to be forthcoming "manuscript".

Respectfully submitted,

Byron N. Scott, *Pro se*
626 A Street, S.E.
Washington, D.C. 20003
Lincoln 6-6840